STATE OF VERMONT

SUPERIOR COURT CIVIL DIVISION
Chittenden Unit

KEY BANK, N.A. Plaintiffs	)	
v.	)	Docket No. 21-cv-1064
KOFFEE KUP BAKERY, *et al.* Defendants	)	

STATE OF VERMONT'S MEMORANDUM OF LAW, AS AMICUS CURIAE, IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL RECEIVER TO PAY URGENT PAYROLL DEDUCTIONS

The State of Vermont, as amicus curiae through the Attorney General, submits this memorandum to support Defendants' Koffee Kup, et al. Emergency Motion to Compel Receiver to Pay Urgent Payroll Deductions. As explained below: (1) Vermont's labor laws require accrued paid time off to be paid as mandatory wages to terminated employees, regardless of a business entering bankruptcy or receivership; and (2) failure to comply with a clear statutory mandate to pay wages and benefits would violate the Vermont Consumer Protection Act.[1]

The State's Interests in Protecting Vermont Employees' Economic Well-Being

First, the State has an interest in ensuring that labor laws are fully complied with and in protecting the "the health and well-being—both physical and *economic*—of its residents in general." *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 215 (2d Cir. 2013) (emphasis added). *See also Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 603

[1] The Attorney General's Office submits this Amicus on behalf of the State of Vermont including the Vermont Department of Labor. The State's appearance is for the limited purpose of providing this memorandum in support of the emergency motion proceeding.

(1982) (noting the "set of interests that the State has in the well-being of its populace," including "economic" interests); *In re Keurig Green Mountain Single-serve Coffee Antitrust Litig.*, No. 14-MD-2542 (VSB), 2021 WL 1393336, at *3 (S.D.N.Y. Apr. 13, 2021) (granting intervention to state Attorneys General to intervene in a pending multidistrict class action and holding that states have a "*parens patriae* interest in protecting the economic well-being of their citizens.").

Second, the State has an interest in ensuring a fair and "honest marketplace" under the Vermont Consumer Protection Act ("CPA"). *State of N. Y. by Abrams v. Gen. Motors Corp.*, 547 F. Supp. 703, 707 (S.D.N.Y. 1982); *State v. Int'l Collection Serv., Inc.*, 156 Vt. 540, 543, 594 A.2d 426, 429 (1991) (citing the CPA's "broader" purpose "to protect the public"). The CPA was enacted "to protect the public" from "unfair or deceptive acts or practices." 9 V.S.A. § 2451. The Vermont Attorney General is authorized to enforce the CPA. *Id.* § 2458.

These interests coalesce together in this matter to ensure both that: (1) Vermont employees are protected and their economic well-being is redressed; and (2) Vermont employers are held to their obligations and that all Vermont employers can count on a fair and honest marketplace of proper wage distributions even when faced with receivership or a business terminating operations.

Argument

Defendants' emergency motion to compel the receiver and Key Bank to pay $797,568.17 in accrued paid time off obligations ("PTO") should be granted. The State offers three arguments in support. First, accrued PTO is generally and widely held to be wages that are payable when a business terminates, including when entering bankruptcy. Second, Vermont labor law is clear that accrued PTO is deemed "wages" under Title 21, Chapter 5, and thus

payable to all terminated employees within 72 hours. Third, failure to comply with labor laws would constitute a violation of the Vermont Consumer Protection Act.

A. PTO is Considered "Wages" That Must Be Paid Regardless of Bankruptcy

PTO is widely held to be "wages." *In re Wil-Low Cafeterias*, 111 F.2d 429, 432 (2d Cir. 1940) ("A vacation with pay is in effect additional wages. It involves a reasonable arrangement to secure the well-being of employees and the continuance of harmonious relations between employer and employee.").

Vermont courts have specifically held that vacation time or PTO is wages:

- "Wages include every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, bonuses ...." [quoting Black's Law Dictionary 1610 (8th ed. 2004)]
- "This Court has broadly defined wages in other contexts to include most forms of compensation for services rendered." [citing *Stowell v. Action Moving & Storage, Inc*., 933 A.2d 1128, 1132 (Vt. 2007)]
- "Vacation pay is included in the broad definition of wages, as remuneration payable for services provided, that can and has been estimated in money."

Cole v. Green Mountain Landscaping, Inc., No. 2:09-CV-5, 2009 WL 2179657, at *2 (D. Vt. July 22, 2009) (ordering vacation time to be paid to a terminated employee under Vermont state wage law).

Other courts also follow the same holding. *See, e.g., Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1106 (7th Cir. 2008) ("the PTO wages were 'wages' under Indiana law"); *Warnecke v. Nitrocision, LLC*, No. 4:10-CV-00334-CWD, 2012 WL 5987429, at *9 (D. Idaho Nov. 29, 2012) ("Paid Time Off constitutes wages under Idaho law."); *Beard v. Summit Inst.*

of Pulmonary Med. & Rehab., Inc., 707 So. 2d 1233, 1236 (La. Mar. 4, 1998) ("This holding is in line with the vast majority of court of appeal cases that have considered this issue – once benefits such as vacation pay have vested, company policy cannot then deprive the employee of the right to these benefits"); *Kotowski v. JGM Fabricators & Erectors, Inc.*, No. CV 18-1512, 2019 WL 2070412, at *1 (E.D. Pa. Feb. 28, 2019) (PTO is "wages" under Pennsylvania wage law).

Accordingly, PTO that is vested cannot be ignored or discharged even when a business faces bankruptcy. *See In re Wil-Low Cafeterias*, 111 F.2d 429 (2d Cir. 1940), which was "a test case" for whether vacation time could be discharged in bankruptcy. *Id.* at 432. The Second Circuit held that vacation time was an "expense" to be paid when a business enters bankruptcy: "[i]t can make no difference whether the discharge is due, as here, to a cessation of business by the employer, or was wrongful. In either event an amount earned would be a valid expense" of paying bankruptcy obligations. *Id.* at 432. *See also In re Pub. Ledger*, 161 F.2d 762, 768 (3d Cir. 1947) (holding that "vacation pay so earned before the trustees took charge" must be paid under federal bankruptcy law.)

Further, federal bankruptcy law requires that vacation time earned prior to the business bankruptcy must be paid as a "priority" status. 11 U.S.C. § 507(a)(4). Numerous bankruptcy courts around the country have interpreted this provision unequivocally. *See, e.g., In re Murray Indus., Inc.*, 110 B.R. 585, 587 (Bankr. M.D. Fla. 1990) ("a Chapter 11 debtor must pay vacation pay earned to laid-off employees immediately"); *Matter of Schatz Fed. Bearings Co., Inc.*, 5 B.R. 549, 556 (Bankr. S.D.N.Y. 1980); *Tool & Die Makers Loc. Lodge No. 113 v. Buhrke Indus., Inc.*, No. 94 C 5728, 1996 WL 131698, at *10 (N.D. Ill. Mar. 20, 1996); *In re Simetco, Inc.*, No. 93-61772, 1995 WL 512187, at *3 (Bankr. N.D. Ohio Aug. 9, 1995).

B. Vermont Labor Laws Require Payment of PTO as Wages After Termination

Vermont's wage laws are codified at Title 21, Chapter 5. Four provisions are relevant. First, 21 V.S.A. § 342 imposes a duty on all Vermont employers to pay wages on a weekly basis.[2] Second, 21 V.S.A. § 482 imposes a duty on Vermont employers to provide earned sick time, and employers may also elect to pay such time as "compensation." 21 V.S.A. § 483(b)(2). Third, "wages" are defined as "all remuneration payable for services rendered by an employee, including salary, commissions, and incentive pay." 21 V.S.A. § 341(5). Fourth, if an employer elects to pay compensatory sick or leave time, then failure to pay wages or compensatory time is a strict violation of Chapter 5 and subject to mandatory fines of $5,000, enforceable by the Commissioner of the Department of Labor. 21 V.S.A. § 345.

Taken together, these statutes all require prompt payment of wages, including accrued PTO, after a business terminates their employees. *Cole v. Green Mountain Landscaping, Inc.*, No. 2:09-CV-5, 2009 WL 2179657 (D. Vt. July 22, 2009). In *Cole*, the Vermont federal district court interpreted these statutes and held that accrued and vested PTO must be paid promptly upon an employee's termination: "The plain meaning of section 342(b)(2) requires all employer debts to be discharged within seventy-two hours of termination, which includes accrued vacation time." *Id.* at *3 (emphasis added). Defendants' emergency motion is thus correct in citing these statutes as being applicable to this situation.[3]

[2] An employer may also elect to pay wages on a biweekly or semimonthly basis, after providing such notice. 21 V.S.A. § 342(a)(2).

[3] The State understands that the PTO here is not in dispute as being an accrued and vested right. The State is relying on Koffee Kup having a longstanding policy of paying out PTO, and assumes that is the case here.

This is also true regardless of the receivership situation. As the *Cole* court pointed out, the principle behind Title 21, Chapter 5 is to ensure PTO gets paid to the employees, regardless of the mechanism:

> The Legislature's intent in codifying section 342(c)(2) was to ensure that workers are paid what they are owed in a timely manner, and as a remedial statute it must be liberally construed to effectuate that intent. Logically, it follows that if accrued vacation time is owed to a terminated employee, it must be paid.

Cole, 2009 WL 2179657 at *3 [emphasis added and citing *Stowell v. Action Moving & Storage, Inc.*, 933 A.2d 1128, 1131–32 (Vt. 2007)].

As this language makes clear, the thrust of Title 21, Chapter 5 is to ensure that all employees are paid their due PTO. It is of no mind who does the paying—whether it is the employer or a receiver. Otherwise, this would result in the terrible and absurd consequences of Vermont employees being denied their rightful benefits and the compensation of their labors. *See In re Estate of Cote*, 2004 VT 17, ¶ 10, 176 Vt. 293, 848 A.2d 264 (courts must consider "entire statute, including its subject matter, effects and consequences, as well as the reason and spirit of the law."); *Fraser v. Sleeper*, 182 Vt. 206, 933 A.2d 246, 2007 VT 78, ¶ 12 (Courts have a duty "to avoid absurd and illogical results ... in favor of [a] reasonable construction.").

Further, as Defendants point out, the receiver in this case stands in the shoes of the employer. This is true first under Vermont's wage law. *See* 21 V.S.A. § 345(a) (noting that the "other officers who have control of the payment operations of the corporation shall be considered employers and liable to the employee for actual wages due."). It is also true under federal labor laws, where receivers are routinely deemed to be "employers" for purposes of the National Labor Relations Act ("NLRA") and other statutes. *See, e.g.*, *Peters v. N.L.R.B.*, 153 F.3d 289, 294 (6th Cir. 1998) ("receiver, is an 'employer' as defined in the NLRA"); *In Matter of Application of Rude*s, No. 95CIV6869, 1996 WL 173355, at *2 (S.D.N.Y. Apr. 12, 1996)

(rejecting receiver's argument that it was not an employer under NLRA because "the Receiver has substantial authority to govern the day-to-day activity of the premises"); *Holiday Inn Coliseum*, 300 NLRB 631 (1990) ("Therefore, Stein, as receiver, is an employer within the meaning of the Act"); *Unrine v. Salina N. R. Co.,* 104 Kan. 236, 178 P. 614, 614 (1919) ("The receivers were an "employer," within the provisions of the Workmen's Compensation Act").

Similarly here, it seems clear that the receiver has complete control over all operations and assets of Koffee Kup, and thus is the effective "employer" for purposes of administering all remaining employee obligations, including paying out the accrued PTO (assuming it properly vested prior to the receivership, *see supra* note 3).

Lastly, there is no injustice to the use of Key Bank's collateral to pay the wages due under this clear state statutory scheme here. *Cole v. Green Mountain*, 2009 WL 10678875, at *2–3 (D. Vt. Aug. 18, 2009) (denying motion for reconsideration and holding that "[p]roviding employees with the accrued vacation pay that their employers agreed to pay them does not produce a manifest injustice.").

C. <u>Applicability of Vermont's Consumer Protection Act</u>

The Vermont Consumer Protection Act ("CPA" or "the Act") prohibits "unfair or deceptive acts or practices in commerce." 9 V.S.A. § 2453(a). The Vermont Attorney General is authorized to enforce the CPA directly. 9 V.S.A. § 2458(a). The CPA is a remedial statute, to be interpreted liberally to accomplish its purposes. *Carter v. Gugliuzzi*, 168 Vt. 48, 52, 716 A.2d 17, 21 (1998) ("The express statutory purpose of the Act is to protect the public against unfair or deceptive acts or practices . . . . Its purpose is remedial, and as such we apply the Act liberally to accomplish its purposes.") (internal quotation marks omitted). One of the purposes of the CPA is "to encourage fair and honest competition" among businesses. 9 V.S.A. § 2451.

A Vermont business, like Defendant Koffee Kup, is also considered a consumer and protected by the CPA. 9 V.S.A. §2451a(a) (consumers include persons who buy "goods or services . . . not for resale . . . but for the use or benefit of his or her business or in connection with the operation of his or her business."); *Rathe Salvage, Inc. v. R. Brown & Sons, Inc.*, 2008 VT 99, ¶ 21, 184 Vt. 355, 365, 965 A.2d 460, 467 (2008) ("we hold unequivocally that business entities are entitled to the same rights under the Act as other consumers").[4]

Under the CPA, it is an unfair act to violate the "public policy as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness." *Christie v. Dalmig, Inc.,* 136 Vt. 597, 601, 396 A.2d 1385, 1388 (1979) (quoting *FTC v. Sperry & Hutchinson Co.* ("Sperry"), 405 U.S. 233, 244 n.5 (1972)).

As applied to this matter, it is the position of the Attorney General's Office that the Legislature has already established a clear public policy of requiring payment of all accrued and vested PTO to all terminated employees. *See* Sections A-B *supra*. Thus, an entity such as the receiver or Key Bank who fails to follow that clear statutory scheme would be committing an unfair act under the CPA, and subject to the remedies therein, including restitution, injunctive relief, and civil penalties of up to $10,000 per violation. 9 V.S.A. § 2458(b).

Additionally, this Court has recognized that the CPA "is designed not merely to compensate consumers for actual monetary losses resulting from fraudulent or deceptive practices in the marketplace, but more broadly to protect citizens from unfair or deceptive acts in commerce ... and to encourage a commercial environment highlighted by integrity and fairness." *Anderson v. Johnson*, 2011 VT 17, ¶ 7, 189 Vt. 603 (2011)). The Attorney

[4] Here, Koffee Kup has acted as a consumer in its relationship to Key Bank, which is a financial arrangement and an exchange of consideration for services (a relief of liability in exchange for the benefits of Koffee Kup's assets and collateral).

General's strong interest in ensuring a fair marketplace would be upended if employees were denied their rightful PTO due to a creditor's, or receiver's, unilateral, groundless and contrary decision. *See, e.g.*, *State of N. Y. by Abrams*, 547 F. Supp. at 707 (discussing the State's "interest in securing an honest marketplace for all consumers"); *People ex rel. Spitzer v. Grasso*, 42 A.D.3d 126, 149-51 (N.Y. 2007), aff'd, 11 N.Y.3d 64, 893 N.E.2d 105 (2008) (noting "the Attorney General had a responsibility to bring this action to ensure that the [stock] Exchange was being operated in a fair and honest manner.").

Therefore, the accrued PTO should be paid to the Koffee Kup employees, both to ensure: (1) protection of potentially affected consumers like Defendants Koffee Kup and their employees; and (2) integrity of the Vermont marketplace, in which all Vermont businesses must follow their obligations equally.

Conclusion

As the Vermont Supreme Court held, Vermont's wage laws are "remedial statutes" and "they must be liberally construed." *Stowell*, 2007 VT 46, ¶ 8. The "reason and spirit," *id.*, of this law was to ensure that accrued PTO gets paid to all Vermont employees who are terminated. The same holds true for Vermont's Consumer Protection Act. 9 V.S.A. § 2451 (requiring a fair and honest marketplace among businesses and consumers alike). Therefore, the unfounded efforts of the receiver and/or Key Bank to deny the employees of Koffee Kup their compensation for labor performed is a clear violation of Vermont's wage laws and the Consumer Protection Act.

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Respectfully submitted,

STATE OF VERMONT

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CERTIFICATE OF SERVICE

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